

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in August 2015

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Contract Term; Temporary Appointment; Inappropriate Behavior; Offensive and Degrading Statements; Academic Freedom' Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Fink v. New River Community and Technical College</u> DOCKET NO. 2015-1059-CONS (8/19/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent was justified in terminating Grievant's Department Chair appointment before the term expired. Whether Respondent's reasons for not renewing Grievant's tenure-track faculty position were arbitrary or capricious.
<u>SUMMARY:</u>	<p>In two separate actions, and for distinctly different reasons, Respondent terminated Grievant's appointment as the Department Chair and decided not to renew Grievant's appointment as a full-time faculty member. Grievant argues that Respondent did not prove that their actions were justified, and that comments that he made during his lectures, which served as the reason for Respondent's actions, were protected under the doctrine of "academic freedom."</p> <p>Respondent failed to demonstrate adequate reason for terminating Grievant's Department Chair position prior to its expiration. However, Respondent did prove that the reasons for not renewing Grievant's full-time faculty appointment were not arbitrary and capricious, and did not violate Grievant's right to academic freedom. The grievance is GRANTED-IN-PART and DENIED-IN-PART.</p>

KEYWORDS: Job Evaluation Plan; Position Information Questionnaire; job duties; classification; arbitrary and capricious

CASE STYLE: Lynch v. Concord University

DOCKET NO. 2015-1582-CONS (8/20/2015)

PRIMARY ISSUES: Whether Respondent acted contrary to any law, rule, policy or regulation in the process of evaluating his PIQ.

SUMMARY: Grievant is currently employed by Respondent as a Trade Specialist II (Electrician). Grievant contends that the Position Information Questionnaire ("PIQ") which he submitted for his position, as approved by his supervisors, was not properly evaluated by the Human Resources Office at Concord University or by the Job Classification Committee ("JCC") of the Higher Education Policy Commission, applying the Job Evaluation Plan ("Plan") for State College and University Systems of West Virginia. Grievant challenged the rating levels he was assigned on three of the twelve point factors in his PIQ which the JCC uses to evaluate a position: Knowledge, Experience, and Scope and Effect. However, Grievant failed to demonstrate that any of the ratings he was assigned by the JCC were clearly wrong, not supported by a rational basis, or obviously erroneous. The ratings assigned represented a reasonable exercise of the JCC's substantial discretion in administration of the Plan. Accordingly, this grievance will be denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Written reprimand; Dress Code; blue denim jeans; appropriate attire; timely filing; continuing practice; insubordination; willful neglect of duty; Employee Code of Conduct ; academic freedom; rational basis test
<u>CASE STYLE:</u>	<u>King, et al. v. Lewis County Board of Education</u> DOCKET NO. 2014-0456-CONS (8/26/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent demonstrated that Grievants' attire on the day in question violated the Dress Code, whether the grievance challenging the policy was timely filed, and whether the Dress Code met the rational basis test.
<u>SUMMARY:</u>	Each of the Grievants was given a written reprimand in late September 2013, for appearing at work in clothing which their principal determined violated the Dress Code which had been adopted by the Board of Education earlier in 2013, and amended in August 2013. During the level three hearing, Respondent agreed to remove and extinguish the written reprimands for Grievants Suan and Posey. Respondent did not demonstrate that the remaining Grievants acted with an intent to defy authority with their clothing choices on the dates in question, or that they understood they were violating the newly adopted Dress Code. Respondent's argument that any challenge to the Dress Code was untimely was rejected. Each application of the Dress Code is a continuing practice. Grievants demonstrated that the Dress Code fails to meet the rational basis test when it bans blue jeans, but allows jeans to be worn if the jeans are a color other than blue, and allows blue jean material capri pants.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Default; Relief; Level One Decision
<u>CASE STYLE:</u>	<u>Mason v. Raleigh County Board of Education</u> DOCKET NO. 2015-0727-RaIEDDEF (8/5/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that default occurred.
<u>SUMMARY:</u>	Grievant made a claim for relief by default when she did not receive a copy of the level one decision within fifteen days. Due to a holiday and a snow day, Respondent's time to issue the decision was extended. Respondent completed its decision and provided a copy to the Grievance Board within the statutory timeframe. Grievant did not receive a copy of the decision, but Grievant failed to prove that default has occurred when Respondent was not required to send the decision by certified mail and Respondent offered credible testimony that the decision was mailed to Grievant. Accordingly, Grievant's claim for relief by default is denied.
<u>KEYWORDS:</u>	Timeliness; Job Posting; Training; Discrimination; Favoritism; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Saunders v. Raleigh County Board of Education</u> DOCKET NO. 2015-0360-RaIED (8/7/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved a claim of discrimination or favoritism against Respondent.
<u>SUMMARY:</u>	Grievant, a custodian, alleges the Board's practice of limiting bus operator training to applicants willing to work as substitutes is arbitrary and capricious, and the Board's action in denying him the opportunity to take the training constitutes discrimination and favoritism. The Board demonstrated that its practice is reasonable, and further rebutted Grievant's claims of discrimination and favoritism. Accordingly, the grievance is denied.

KEYWORDS: Changes to Bus Route; Student Transfer Location; Safety Issues; Additional Compensation; Out-of-Zone Student; Daily Rate of Pay; Discrimination; Favoritism

CASE STYLE: Freda v. Lewis County Board of Education
DOCKET NO. 2014-0866-LewED (8/7/2015)

PRIMARY ISSUES: Whether Grievant's bus route was unlawfully changed, and whether Grievant was entitled to additional compensation for transporting an out-of-zone student.

SUMMARY: Grievant is employed by Respondent as a Bus Operator. Grievant's bus route was changed mid-year, requiring him to travel approximately one additional mile to pick up a student who was being allowed to attend a school outside the student's attendance zone. This change added no additional time to Grievant's workday. The location of a student transfer point was also changed at this time to a location Grievant believes is less safe than the transfer point which had been used before. Grievant seeks additional compensation for the addition to his route based on Respondent's past practice of compensating bus operators for picking up students outside their attendance areas. Grievant did not demonstrate that the changes to his route violated the applicable statute which precludes a board of education from changing a bus route, nor did he demonstrate that the student transfer point was unsafe. Grievant did demonstrate that he was treated differently from other similarly situated bus operators, and the he is entitled to be compensated for transporting the student from outside his assigned attendance area.

KEYWORDS: Suspension; Termination; Immorality; Willful Neglect of Duty

CASE STYLE: Adams v. Kanawha County Board of Education

DOCKET NO. 2015-0968-KanED (8/6/2015)

PRIMARY ISSUES: Whether Respondent was justified in suspending and terminating Grievant from employment.

SUMMARY: Grievant was employed by Respondent as a Cook II. On December 8, 2014, the cafeteria manager informed the school principal that there were several pounds of pepperoni in a plastic bag sitting in Grievant's tote bag in the restroom. The principal did not independently verify this allegation. At the end of the day, the principal watched Grievant leave with her tote bag and other personal belongings. The principal did not stop Grievant and ask to look in her bag. Grievant simply left work at the end of the day without incident. The principal never saw any pepperoni in Grievant's possession, and never spoke to Grievant about the allegations made against her that day. In fact, no one spoke to Grievant about the pepperoni that day. The next morning, the principal called Grievant to his office and questioned her about taking the pepperoni off school premises. Grievant denied taking any pepperoni off school premises, but admitted to eating some pepperoni slices while at work the day before, which is permitted. The principal suspended Grievant without pay for taking the pepperoni off school premises in violation of policy. Thereafter, Respondent charged Grievant with immorality and willful neglect of duty, approved the suspension, and terminated Grievant's employment for said misconduct. Grievant denied all of Respondent's claims, and asserts that she did not take any pepperoni off school premises. Respondent failed to prove its claims by a preponderance of the evidence. Accordingly, the grievance is GRANTED.

KEYWORDS: Res judicata; timeliness; time limits; misclassified; previous grievance

CASE STYLE: Hoke v. Lincoln County Board of Education

DOCKET NO. 2015-1088-LinED (8/27/2015)

PRIMARY ISSUES: Whether the grievance was timely filed.

SUMMARY: Grievant previously filed a virtually identical grievance and did not appeal an adverse level one decision. Grievant can rely on the concept of a continuing grievance to contest the classification of her position at any time, but only once. After that the grievance is no longer timely filed.

KEYWORDS:

Insubordination; willful neglect of duty; special needs students; wheelchair restraints; discrimination

CASE STYLE:

Kinder v. Kanawha County Board of Education

DOCKET NO. 2015-0421-KanED (8/31/2015)

PRIMARY ISSUES:

Whether Grievant's actions constituted willful neglect of duty and insubordination.

SUMMARY:

Grievant was employed as a school bus operator. On April 4, 2014, a special needs student in a wheelchair was injured when his chair tipped over while being transported on Grievant's afternoon bus run. The video recording of that bus run revealed that the assigned bus aide failed to properly secure the wheelchairs of two special needs students when they were loaded on the bus using the hydraulic lift, and that Grievant failed to comply with her training and established job duties in that she did not check the restraints to verify that the students had been properly secured by the aide. In addition, the video showed Grievant releasing only 3 of 4 required restraints from the wheelchair of the first special needs student who was offloaded from the bus at the previous bus stop, so that she necessarily became aware that the aide had not properly secured that student's wheelchair. The video also makes evident that Grievant did not thereafter check the remaining student's wheelchair, to verify that it was secure, and that at least 2 of the 4 restraints can be seen lying on the bus floor in plain view of Grievant, and not properly attached to the wheelchair. After Grievant returned to the front of the bus, she was joined by the aide before driving the bus to the next stop. Before the bus reached the next bus stop, the wheelchair transporting a non-verbal special needs student tipped over, and the student was injured, suffering a cut on his head when he struck an object on or near the bus floor. Review of the video from Grievant's previous bus runs for approximately 10 days prior to the accident showed that she never checked to see that her regularly assigned aide had properly secured the wheelchairs of their special needs student passengers. KCBE established by a preponderance of the credible evidence of record that Grievant's conduct was a direct and proximate cause of injuries received by the special needs student while a passenger on Grievant's bus, and that Grievant's failure and refusal to verify that this wheelchair was properly restrained constituted both willful neglect of duty and insubordination under W. Va. Code § 18A-2-8(a). Further, in the circumstances presented, Grievant's conduct was not "correctable" within the meaning of West Virginia Board of Education Policy 5300. Therefore, this grievance must be denied.

<u>KEYWORDS:</u>	Extracurricular assignment; posting; job duties
<u>CASE STYLE:</u>	<u>Wilt, et al. v. Marshall County Board of Education</u> DOCKET NO. 2014-1757-CONS (8/20/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent violated applicable law when it failed to post the extracurricular assignment.
<u>SUMMARY:</u>	Grievants are employed as bus operators by the Respondent. For many years, Respondent has employed a special needs trainer, selected by Respondent's Director of Transportation, to train bus operators in the use of special equipment used to accommodate special needs students as well as ordering, care and replacement of that equipment as necessary. Due to an employee's retirement, Respondent filled the special needs trainer position with two employees to provide flexibility in carrying out the duties of this position. It is undisputed that Grievants have greater seniority and more special needs transportation experience than the successful applicants. Given the broad statutory language setting out extracurricular assignments, and the specialized qualifications of the position, the record supported a finding that Respondent be ordered to post the special needs assignment positions.

KEYWORDS: Insubordination; Dock Day; Willful Neglect Of Duty; Arbitrary and Capricious; Leave Policy

CASE STYLE: Carr v. McDowell County Board of Education

DOCKET NO. 2015-1114-McDED (8/20/2015)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in insubordinate conduct and whether Grievant's suspension was justified.

SUMMARY: Grievant is employed by Respondent as an Aide. Respondent implemented a new leave policy on July 1, 2014, which changed the procedure for taking "dock days." "Dock days" are unpaid absences not covered by accrued personal leave. Respondent notified all employees, including Grievant, of the new policy before it came into effect. Further, Respondent provided employees with training on the new policy at staff development workshops at the beginning of the school year. Respondent also mailed a memo summarizing the new dock day policy to all employees, including Grievant, on December 2, 2014. Grievant took a half day off work on December 16, 2014, and a full day off work on December 19, 2014, but did not have enough accrued leave to cover her absences. Therefore, she took 1.5 dock days without following the procedure set forth in the new policy. As a result, Grievant was charged with insubordination/willful neglect of duty, and suspended for one day without pay. Grievant denied the charges, claiming that she was not aware of the new policy for taking dock days. Respondent proved its claim of insubordination by a preponderance of the evidence. Accordingly, the grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Classification; Reallocation; Job Description; Training; Arbitrary and Capricious; Certification; Change in Duties; Aggregate Testing Requirement; Materials Section
<u>CASE STYLE:</u>	<u>Morton v. Division of Highways</u> DOCKET NO. 2015-0067-DOT (8/13/2015)
<u>PRIMARY ISSUES:</u>	Whether Respondent's failure to submit Grievant's position for reallocation was arbitrary and capricious.
<u>SUMMARY:</u>	Grievant believes that Respondent should have submitted his position for reallocation to the classification of Transportation Engineering Technician Associate, because he has achieved the certification which he believes automatically qualifies him to be placed in this classification. Grievant did not prove that this is true or that Respondent was required to submit his position for reallocation.

KEYWORDS:

Fair Labor Standards Act; Minimum Pay Requirements; Overtime Compensation; Discrimination

CASE STYLE:

Abdulla v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2012-1354-CONS (8/12/2015)

PRIMARY ISSUES:

Whether Grievant was entitled to compensation for working in excess of 40 hours per week.

SUMMARY:

Grievant was employed by Respondent as a physician at William R. Sharpe, Jr. Hospital. Grievant worked a 40-hour weekend shift from Friday evening through Sunday morning as the sole doctor on call to care for approximately 150 patients. Grievant established by preponderant evidence that Respondent violated the federal Fair Labor Standards Act ("FLSA") on one occasion when 15 minutes of Grievant's pay was docked for leaving 10 minutes or less early at the end of his regular 40-hour weekend shift, when Grievant's relief physician reported early, and told Grievant he could leave, if he wished. However, Grievant failed to establish that Respondent's one-time act of docking his pay forfeited the exemption from paying overtime to a professional employee contained in the FLSA. Further, Grievant failed to establish a prima facie case of discrimination in regard to payment for work performed in excess of 40 hours per week by salaried, FLSA-exempt professional employees. Thus, Respondent was not required to provide any additional compensation to Grievant on any occasions when he continued working beyond 40 hours until another physician reported for duty at the hospital. Accordingly, this grievance will be granted, in part, and denied, in

KEYWORDS: Suspension; Investigation; Reprisal; Retaliation; Unreliable Hearsay

CASE STYLE: Abdulla v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2014-1187-DHHR (8/12/2015)

PRIMARY ISSUES: Whether Respondent had good cause to suspend Grievant.

SUMMARY: Grievant was suspended from his position as a Physician at William R. Sharpe Hospital pending investigation into a complaint that Grievant failed to properly examine a secluded patient within required time frames, and requested the nursing staff to document that he had been present in the unit when he had not. During a Level Three evidentiary hearing on June 29, 2015, Respondent presented no testimony from any witness present during the alleged events, only an unsworn investigative summary prepared by an investigative team working under the authority of Legal Aid of West Virginia. Grievant credibly testified that he did not examine a patient he placed in seclusion within an hour due to Grievant's own illness, but the patient was released by staff after 45 minutes. Thus, there was no violation of the hospital's policy requiring that a physician examine a patient by the end of the patient's initial hour in seclusion. Respondent failed to establish the disciplinary charges against Grievant by a preponderance of the credible evidence of record, and thus, Grievant's challenge to this suspension will be granted.

KEYWORDS: Non-Retention; Dismissal; Attendance; Probationary Employee; Unsatisfactory Performance; Arbitrary and Capricious

CASE STYLE: Elliott v. Division of Highways

DOCKET NO. 2015-1065-DOT (8/14/2015)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that his services for Respondent were satisfactory.

SUMMARY: Grievant was employed as a probationary employee by Respondent. Grievant was absent from work on two consecutive days during a weather-related State of Emergency while he was assigned to snow removal and ice control duty. Grievant argued that he was unable to report to work because the roads near his home were impassible. Respondent argued that Grievant made comments to his supervisors suggesting that he would report to work if he were provided lodging and meals. As such, Respondent determined that Grievant's failure to report to work on the two days constituted unsatisfactory performance, and dismissed him from employment. Grievant denied Respondent's claims, asserting that he never made such comments, and that his services were satisfactory. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, the grievance is DENIED.

KEYWORDS: Suspension; Termination; Gross Misconduct; Assessments; Mistake

CASE STYLE: Scott v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2015-0851-CONS (8/6/2015)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence good cause to terminate Grievant's employment.

SUMMARY: Grievant was employed as a Child Protective Services Worker in the Bureau for Children and Families. The Department received an intake alleging abuse and/or neglect, and the intake was assigned to the Grievant. Ms. Scott met with the family members and documented a contact with an infant child on July 15, 2014. In November 2014, the Department received another intake alleging abuse and/or neglect in the same family, and the intake was assigned to a different Child Protective Services Worker. When the Child Protective Services Worker reported confusion over the infant being listed in the previous assessment, the Department investigated and discovered that the infant had died the same day he was born on February 7, 2014, five months before Grievant reported she observed the infant. The Department suspended Grievant pending investigation, and later terminated her for falsifying documents. Respondent failed to meet its burden of proof to establish that Grievant engaged in gross misconduct. The record failed to provide a meaningful investigation in support of the charge, and lacked testimony of Grievant's supervisors concerning the decisions made in coming to the conclusion to terminate Grievant's employment. The Grievant was not questioned prior to the decision to terminate; therefore, she was unable to explain that what had happened in drafting the assessment was a mistake. The record failed to establish the existence of corroborating evidence that Grievant engaged in the deliberate falsification of the assessment.

KEYWORDS: Job duties; misclassification; salary; arbitrary and capricious

CASE STYLE: Pedersen v. Housing Development Fund

DOCKET NO. 2015-0342-HDF (8/19/2015)

PRIMARY ISSUES: Whether Grievant established that he is required to perform the duties of higher job classification.

SUMMARY: Grievant is employed by Respondent in a position designated as a Senior Technical Services Administrator, pay grade 6. He seeks to have the position recognized as a Managing Director - Architectural & Technical Services, pay grade 8. Management personnel reviewed and assessed Grievant's position and salary multiple times before this proceeding and on occasion Grievant received salary increases. Respondent maintains that Grievant's position is lawfully classified.

While Grievant is a licensed architect, the job responsibilities that he is required to perform does not require said credentials to perform the job duties. Grievant failed to establish by a preponderance of the evidence that Respondent violated any section of West Virginia Code or acted in an arbitrary or capricious manner. Grievant did not demonstrate that Respondent's classification decision is clearly wrong and/or he should be compensated as a Managing Director. Accordingly this grievance is DENIED.

<u>KEYWORDS:</u>	Jury Service; Failure to Provide Jury Summons; Annual Leave; Policy; Discrimination
<u>CASE STYLE:</u>	<u>Burleson v. Department of Health and Human Resources/Jackie Withrow Hospital</u> DOCKET NO. 2014-1006-DHHR (8/17/2015)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that Respondent was incorrect in applying the Division of Personnel's policy to require that Grievant use annual leave to cover her evening shift absence after the end of her day's jury service.
<u>SUMMARY:</u>	Grievant grieved Respondent's requirement that she report for her evening shift following the end of her jury service and Respondent's charging her annual leave when she did not return and asserted that Respondent had discriminated against her in requiring her to provide the specific times of her jury service. Grievant failed to comply with the Division of Personnel's policy to provide a copy of her summons for jury service to her immediate supervisor in advance of her jury service. Grievant did not prove that Respondent was incorrect in applying the Division of Personnel's policy to require that Grievant use annual leave to cover her evening shift absence after the end of her day's jury service. Grievant did not establish a claim of discrimination for Respondent's requirement that she provide the specific times of her jury service because the Division of Personnel's policy requires she provide this information and she was not similarly situated to other employees who were not required to provide the same detailed information required of Grievant. Accordingly, the grievance is denied.